Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1343

ROBERTO GOMEZ-ROJAS,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

No.

ROBERTO GOMEZ-ROJAS,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals, Fifth Circuit

The Petitioner, ROBERTO GOMEZ-ROJAS, respectfully prays a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on November 27, 1974.

OPINION BELOW

The opinion of the Court of Appeals is reported in 507 F.2d 1213 (5th Cir. 1974), and appears in the appendix hereto. A copy of the Order denying the Petition for a Rehearing, entered March 26, 1975, also appears in the appendix.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on February 10, 1975. A Petition for a Rehearing was timely filed and an Order denying the Petition for Rehearing was entered on March 26, 1975. This Petition for Certiorari was timely filed within thirty (30) days of that date. This Court's jurisdiction is invoked under Title 28, United States Code, Section 2154(1).

QUESTIONS PRESENTED

I

Whether Fundamental Fairness requires the production at new trial of a known and available government informant who instigates the criminal activity when the case against a Defendant is circumstantial.

II

Whether the Sixth Amendment Right to Confrontation in the context of the *Bueno* defense of entrapment, compels the production at new trial of an available government informant who instigates the criminal activity and who supplies the contraband which forms the basis of conviction of a co-defendant.

CONSTITUTIONAL PROVISION

The following portion of the Sixth Amendment of the Constitution of the United States:

> In all criminal prosecutions, the accussed shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor. . .

STATEMENT OF FACTS

This case involves two defendants, ROBERT GOMEZ-ROJAS and MICHAEL RECE SUTHERLIN. Appellants were convicted of violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. 846. The Fifth Circuit, on direct appeal reversed and remanded the conviction of MICHAEL RECE SUTHERLIN. Only co-defendant ROBERTO GOMEZ-ROJAS petitions this Court.

The facts involve the interplay between three characters: Agent DeHoyos, posing as a buyer of marijuana; the informant, George Smith, the purveyor of the marijuana; and co-defendant Sutherlin, who was solicited as the middle man. On November 12, 1974, at approximately 5:30 p.m., Michael Rece Sutherlin was introduced to Phillip DeHoyos, an undercover agent of the Drug Enforcement Agency (DEA), by an individual named George Smith. (Tr. 25)* The purpose of the meeting was to negotiate a marijuana transaction which was ultimately consumated and which became the basis for the convictions of both MICHAEL RECE SUTHERLIN, and Petitioner ROBERTO GOMEZ-ROJAS. The role of the informant, George Smith, both before and after the above described meeting was

* References are to the unprinted trial record submitted before the Fifth Circuit and certified to this Court by the Clerk of the Fifth Circuit.

crucial. The informant supplied and planted the contraband and was an active participant in and instigator of the criminal activity. The testimony was uncontradicted that after a telephone conversation between Agent DeHoyos and George Smith on the afternoon of November 12, 1974, (Tr. 24) Smith took co-defendant Sutherlin to the Royal Inn Motel in El Paso, Texas, and introduced co-defendant Sutherlin to DeHoyos. (Tr. 25) Agent DeHoyos and several surveilling DEA agents testified that DeHoyos, posing as the buyer, and Sutherlin left the motel room and went to the motel parking lot to count a sum of cash which Agent DeHoyos had been given to purchase marijuana. (Tr. 25-27, 86, 107, 115) The marijuana was taken from the trunk of George Smith's automobile.

The second of three meetings between co-defendant Sutherlin and Agent DeHoyos occurred about one hour later at Denny's Restaurant on Mesa Street in El Paso, Texas. This second meeting consisted of further conversations between the two and Sutherlin instructed DeHoyos to have George Smith rent a car and bring it to Denny's. (Tr. 32) DeHoyos did instruct the informant, Smith, to obtain the rented car, (Tr. 32) and pursuant thereto Smith brought to Denny's a light brown, beige Ford which had been rented (Tr. 32, 89-90, 136) Because of the prosecution's efforts to prevent the production of Smith, the defense was unable to establish if the car was rented in Smith's name.

Agent DeHoyos testified that at this second meeting with co-defendant Sutherlin, a vehicle entered the parking lot driven by Petitioner Gomez-Rojas and Sutherlin said, "That is my man" and then went to the

parking lot. (Tr. 30-31) Other agents testified that they observed Sutherlin talking to Petitioner Gomez-Rojas in Denny's parking lot. (Tr. 118-119) This is the point at which the complicity of Petitioner Gomez-Rojas is raised. This is the only evidence to connect Gomez-Rojas with criminal activity. The testimony varied as to the number of conversations between Sutherlin and Gomez and as to the duration of the conversations. (Tr. 118-119, 88-89) Both Gomez-Rojas and Sutherlin explained in their trial testimony the purpose for and the contents of the conversations. (Tr. 2.5, 2.9-220, 306, 309) Sutherlin also denied his alleged extra-judicial statement: "That is my man," (Tr. 254, 275-276) which the prosecution used to connect GOMEZ-ROJAS with the drug transaction.

After the second meeting at Denny's Restaurant, Sutherlin instructed Agent DeHoyos to drive the rental vehicle and follow Sutherlin approximately 1/2 mile down Mesa Street and leave the vehicle in the parking lot of Sambo's Restaurant, also located on Mesa Street in El Paso, Texas. (Tr. 34) DeHoyos accompanied by George Smith, left the vehicle as instructed and then Sutherlin drove both DeHoyos and Smith back to the Royal Inn Motel. (Tr. 34)

The third meeting between DeHoyos and Sutherlin occurred later that evening at approximately 10:00 p.m. at the same Denny's Restaurant. (Tr. 35) The purpose of this meeting was to consumate the delivery of approximately three hundred (300) pounds of marijuana provided by Smith in exchange for $22,500 provided by the government. (*Id.*) After some discussion, Sutherlin proceeded to the Desert Hills Motel on

Mesa Street, followed by Agent DeHoyos and a surveilling DEA agent. (Tr. 35) Upon entering the motel parking lot, Sutherlin indicated that the rental vehicle was present and that the trunk was loaded with the contraband. (Tr. 36) Sutherlin instructed Agent DeHoyos that the keys would be in the ash tray and that after Agent DeHoyos had inspected the contents of the trunk he was to give the cash to Sutherlin. (*Id.*) Immediately after DeHoyos inspected the marijuana, Sutherlin was arrested. (Tr. 36) Simultaneously, Petitioner Gomez-Rojas was arrested in a vehicle parked in the same parking lot approximately one hundred (100) feet from the rental vehicle which contained the marijuana. (Tr. 79, 111-112, 143) George Smith also was arrested.

There was testimony from several DEA agents who corroborated the testimony of Agent DeHoyos as to the above described meetings, (Tr. 93, 112, 113, 154) but none were able to testify as to the conversations. There was also testimony that after the rental vehicle was dropped off at Sambo's Restaurant, by the informant, a person dressed like Petitioner Gomez-Rojas was seen transferring the vehicle across the street to a shopping center parking lot. (Tr. 123) However, neither of the two agents who witnessed the transfer was able to positively identify the driver as Gomez-Rojas. (Tr. 140, 152) One surveilling agent, John Nattinger, testified that he saw Gomez-Rojas get into the rental vehicle, (Tr. 151) but he described the vehicle as a gold colored Chevrolet Impala and not a beige Ford. (Tr. 160) It was not established at what point the contraband was loaded into the rental vehicle, nor whether Gomez-Rojas or the informant, Smith, loaded the

vehicle. The location where Gomez-Rojas was allegedly seen in the gold Chevrolet Impala was next door to Rudolph Chevrolet (Tr. 310) where Gomez-Rojas was employed as a salesman of new Chevrolet automobiles. (Tr. 302)

At trial Sutherlin testified in his own behalf to facts substantially as those testified to by government agents. (Tr. 204-276) In addition, he was able to elaborate substantially upon the role of the informant, George Smith, in the marijuana transaction. (Tr. 190-276) Sutherlin testified that he was approached by George Smith to be a middle man in a marijuana sale (Tr. 192-204) and that Smith would introduce Sutherlin to a buyer, Agent DeHoyos, and would supply the marijuana. (Tr. 197) The involvement of George Smith, as testified to by government agents, (Tr. 24, 25, 26, 27, 32, 35, 47, 50, 52, 54, 64-65, 89, 99, 100, 113, 150, 362) and his role, as testified to by Sutherlin, (Tr. 192-276) amounted to entrapment as a matter of law; therefore, the government should have been obligated to call George Smith as a witness to rebut these allegations. Both defendant's subpoenaed George Smith (Tr. 40) and attempted to call him as a witness, (Tr. 352) the Trial Court released the said George Smith from the subpoena and repeatedly ordered both defense counsel to refrain from advising the jury of the subpoena and to refrain from any questioning concerning George Smith's role in the transaction. (Tr. 14, 15, 16)

Appellant Sutherlin further testified that Gomez-Rojas had no knowledge nor complicity in the marijuana transaction. (Tr. 190-276) Sutherlin testified that he had spoken briefly with Gomez-Rojas at Denny's

Restaurant, asked to meet him later that evening at the Desert Hills Motel, for the purpose of giving Sutherlin a ride home. (Tr. 219-220) Sutherlin testified that the idea to commit the crime was initiated by George Smith (Tr. 228) and that Smith supplied the marijuana. (Tr. 202) Neither defense counsel was permitted to develop the role of George Smith as an informer or agent of the DEA nor his relationship with DEA agents in this case. (Tr. 14-18, 45, 46, 47, 48, 49, 50, 51, 54, 61, 62, 65, 66, 67, 81, 176, 179, 184, 195, 363, 391, 401, 402)

Gomez-Rojas testified that he was not involved in the marijuana transaction (Tr. 326), was present at Denny's Restaurant by mere coincidence, (Tr. 307), and was present at the Desert Hills Motel at the request of his friend Sutherlin. (Tr. 312)

Throughout the trial, the presiding Judge denied counsel for each defendant the opportunity to establish the defense of entrapment and the related Sixth Amendment issue of the confrontation of George Smith. (Tr. 8, 9, 10, 11, 14, 15, 16, 18, 31, 42, 44, 45, 46, 47, 48, 49, 50, 51, 54, 55, 56, 57, 58, 61, 62, 65, 66, 67, 68, 74, 75, 81, 83, 125, 156, 175, 176, 178-179, 181, 184, 186, 195, 229, 262, 278, 328, 320, 350-351, 352, 354-355, 358, 363, 365, 366, 391, 401, 402, 431, 432, 439-440, 444).

REASONS FOR GRANTING THE WRIT

The following is precisely the first point of law which Defendant's Roberto Gomez-Rojas and Michael Rece Sutherlin presented on appeal (Brief of Appellants, 6):

POINT ONE

The Trial Court Erred In Overruling Appellants' Repeated Requests For The Disclosure Of The Informant In This Case In Violation Of Appellants' Right To A Fair Trial And Confrontation Of Witnesses Against Them, Such Non-Disclosure Effectively Precluding Appellants' Defense On The Grounds Of Entrapment.

George Smith was the police informant and an active participant and the supplier of the marijuana. "Both [defendant's] herein subpoenaed George Smith (R. 40) and attempted to call him as a witness (Tr. 353), the Trial Court released the said George Smith from the subpoena and ordered both defense counsel to refrain from advising the jury of the subpoena and to refrain from any questioning concerning George Smith's role in the transaction. (Tr. 14, 15, 16)." (Brief of Appellants, 5)

The Fifth Circuit in its opinion, 507 F.2d 1213, did not address the Sixth Amendment right to the confrontation of George Smith, the *agent-provacateur* in this "sordid spectacle of the Government selling marijuana to itself." The most important point of error argued by *both* defendants was the denial of the opportunity to confront George Smith,[1] a unique and

---

1 Appellants insist on the fundamental right to confront for a threefold purpose: (1) to insure reliability by means of the oath; (2) to expose the participant-informant to the probate of cross-examination; and (3) to permit the trier of fact to weigh the demeanor of the witness in determining his credibility. *Cf.* California v. Green, 399 U.S. (1970).

material witness, and indeed the only unindicted witness who could present the jury with *direct* testimony as to the guilt or innocence of Petitioner, Gomez-Rojas. In addition to the denial of general Sixth Amendment protections, there are two specific ramifications of denying a criminal co-defendant the right to confront an informant when he is an active participant in the alleged criminal activity and provides the contraband: first, denial of fundamental fairness when the prosecution has an informant readily available, has an obviously weak circumstantial case, yet for unknown reasons refuses to produce exculpatory testimony, and second substantial prejudice to the co-defendant's exculpatory testimony.

I

Denial of Due Process

The right to confront an informant such as Smith (which can only be defeated by Smith's Fifth Amendment privilege) is militated by the circumstantial case presented. The Fifth Circuit noted:

> Much of the evidence against Gomez-Rojas tends only to establish his guilt by association with Sutherlin . . . 507 F.2d at 1222
>
> . . . the evidence against the defendant . . . is completely circumstantial. 507 F.2d at 1223
>
> Although circumstantial evidence against him is far from over whelming, it is sufficient to sustain the jury verdict. 507 F.2d at 1224

The informer's privilege stands in pale contrast to the Defendant's right of confrontation and right to a fair trial, especially where there is only circumstantial evidence presented and the participant-informant is readily available. Where the circumstantial evidence relied on by the prosecution is obviously weak, and where the record on appeal affirmatively shows not only that other testimony which would have cast additional light on the facts was available to the prosecution, but also that the prosecution failed to introduce such other evidence or satisfactorily account for its failure to do so, the appellate court should treat the case as one showing reasonable doubt of the sufficiency of the evidence to support the conviction.[2] Even if the federal courts are not to give this particular construction to the facts presented by *Gomez-Rojas*, it cannot be doubted that the failure to produce the informant strongly suggests that his testimony would be favorable to the Defendant.

If Smith is *not* compelled to testify then this would allow the government effectively to cover up its nefarious activities by having its *instigator-informers* take the Fifth with or without valid basis for invoking the privilege. This is not a practice that this Court can lightly sanction. It is submitted that the government had no intention of prosecuting its *agent-provacateur*, even though he was arrested along with defendant's Gomez-Rojas and Sutherlin and was a member of the alleged conspiracy; therefore, Smith could not validly claim the Fifth. Perhaps Smith has

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2 This is the Texas evidence standard in such cases. 24 Tex. Jur. 2d, Evidence, Sec. 745, p. 427; Ysaga v. State, 444 S.W. 2d 305 (Crim. App. 1969). Although this is certainly not controlling in this case, it does provide an interesting insight.

been given immunity, which would explain why he was not prosecuted.

These questions remain unanswered because of an apparent cover-up by the government. There can be no merit in the allegation that the government is trying to protect its informant because his identity is well known. The Fifth Circuit remanded for a determination of the parameters of Smith's privilege against self-incrimination, whether real or imagined, in the context of co-defendant Sutherlin's entrapment defense. Gomez-Rojas *also* insisted on his right to confront George Smith, and that the parameters of Smith's privilege should, a fortiori, be determined in the context of Gomez-Rojas' claim that he was denied a fair trial. Petitioner asks that this Court remand for a new trial to determine the propriety of Smith's privlege against self-incrimination vis-á-vis Gomez-Rojas.

In sum, the production of Smith at a new trial is compelled by the rationale of *McLawhorn v. State of North Carolina*, 484 F.2d 1 (4th Cir. 1973):

> [W]here the informant is an actual *participant*, and thus a witness to material and relevant events, fundamental fairness [Fifth Amendment Due Process] dictates that the accused have access to him as a potential witness. (emphasis added) 484 F.2d at 5.

George Smith was no "mere tipster." George Smith should have been produced before the jury, he should have been questioned under oath, and the defense

should have been allowed not only cross-examination but comment on Smith's leading role in the alleged criminal activity. Not to put the instigator-informant on the stand is to deny the jury demeanor evidence reliable under oath. The Defendants are also entitled to a jury charge on Smith's complicity. It is impossible to second guess the jury's findings in such a close circumstantial case without the undoubtedly meaningful testimony of the informant.

II

Prejudice of Inability to Present Entrapment Defense

The most important point urged by Petitioner is that the *Bueno* defense of entrapment inures to his benefit. It was not the disclosure of the informant (his identity was known to both defendants who subpoenaed him), nor the confrontation clause, which resulted in partial reversible error in this case. Rather, the issue was narrowed by the Fifth Circuit to whether Smith's claim for privilege was well founded since "the district court excused Smith without the slightest inquiry into the legitimacy or scope of his [Smith's] refusal to testify." As the Fifth Circuit stated:

> If the [trial] court finds that Smith cannot properly invoke the Fifth Amendment with respect to any relevant and material questions which Sutherlin proposes to ask him, then Smith *must testify* at the new trial. If on the other hand, the Court finds that Smith may legitimately refuse to answer . . . then the district court must decide in its informed discre-

> tion whether in light of Sutherlin's entrapement defense, Sutherlin should be allowed to elicit Smith's refusal to testify before the jury or to comment on that refusal. 507 F.2d 1213, 1220 (5th Cir. 1975) (emphasis added).

The Fifth Circuit also stated:

> Sutherlin's complaint involves a complex interplay between the *law of entrapment* the *informer's privilege* and Smith's Fifth Amendment *right against self-incrimination*. 507 F.2d 1213, 1217 (5th Cir. 1975) (emphasis added).

In the evaluation of an *informer's privilege* and his *right against self-incrimination* the Court overlooked that the balancing interest is not just the defense or entrapment but *also* the Defendants' *right to prepare their defense throughout the compulsory process and confrontation clauses of the Sixth Amendment.*

With respect to Sutherlin, it is essential that there be effective cross-examination of the police informer since it is well established that such confrontation is the most fruitful means of adducing entrapment testimony. As for Gomez-Rojas, his defense was inextricably interwound with Sutherlin's defense because both were before the same jury. Although it may be argued that Gomez-Rojas might not be able to assert entrapment which was framed by Sutherlin in the first point of error, whatever evidence was presented to the jury in support of the entrapment defense quite clearly would reflect upon Sutherlin's credibility. This

would not only enhance Sutherlin's exculpatory testimony about co-defendant Gomez-Rojas, but reflect on Gomez-Rojas himself as well. The testimony of Smith was "significant" for *both* defendants. *Cf. Roviaro v. United States*, 353 U.S. 53, at 62 (1957).

The Fifth Circuit has enunciated a rule of entrapment which is substantially different from that enunciated by this Court in the *Sherman* and *Sorrells* cases. *Sorrells v. United States*, 287 U.S. 435 (1932); *Sherman v. United States*, 356 U.S. 369 (1958). The *Bueno* defense, that entrapment is found as a matter of law when the government provides the contraband, is unique to the Fifth Circuit, and appears in conflict with this Court's opinion in *Russell*. *United States v. Russell*, 411 U.S. 423 (1973). The degree of police participation can amount to entrapment as a matter of law, although this court seemed to reject this proposition in *Russell*. But because the Fifth Circuit maintains the viability of *Bueno*, and because this is a *Bueno*-Type case, the government's task on re-trial is a difficult one. "It may not rely solely on the jury's decision to believe or not to believe the defendant's story. *United States v. Bueno*, 447 F.2d 903, 906 (5th Cir. 1971). Since in many cases of this type, of which *Bueno* itself was one, the only witness to the alleged entrapment are the defendant and the government agent or informer, the *Government must call* the alleged supplier, its officer as a witness." *Gomez-Rojas v. United States*, 507 F.2d 1213, 1218 (5th Cir. 1975) (emphasis added).

Petitioner calls into question the scope of Fifth Circuit rule in *Bueno*, that entrapment is found as a matter of law when the government provides the contraband. *United States v. Mosley*, 496 F.2d 1012 (5th Cir. 1974). If entrapment is found as a matter of law in this case, the conspiracy charge cannot stand, and the jury could quite possibly exonerate Gomez-Rojas given a proper entrapment charge. In this sense the *Bueno* defense of entrapment inures to the benefit of a co-defendant.

The issue which is squarely presented by *Gomez-Rojas* is also that of confrontation. There are very strong indications that because of the defense of entrapment the participant-informant's privilege must give to the defendant's right to call him, especially since the informant is known and is available. In a case where it is alleged that the contraband came from a government agent it is more likely that the informer's privilege should yield and the government be compelled to produce the informer for cross-examination. This conclusion follows from *Bueno* which appears to hold, *inter alia*, that when a defendant testifies that he obtained the contraband from an informer, establishing a defense as a matter of law, the government *must produce* the informer, if available, to contradict the defendants allegations *in order* to take the case to the jury.

> The defendant having testified to facts which establish a defense as a matter of law, the government has the duty to come forward with contrary proof, it is to carry its ultimate burden of proving built beyond all reasonable doubt. *Bueno*, 447 F.2d at 906.

As the Fifth Circuit said in *Bueno*, "[i]t was the activity of the informer, who was *not* called to testify, that is fatal to this conviction" 447 F.2d at 904. (emphasis added). Both *Bueno* and *United States v. Oquendo*, 490 F.2d 161 (5th Cir. 1974), seem to indicate that once the issue of the informant's complicity is broached, the informant, if available, must come forward. Thereafter, the issue of the defendant's entrapment is properly one for the jury. *See, e.g., United States v. Bueno*, 470 F.2d 154 (5th Cir. 1972), *cert. denied*, 411 U.S. 949 (1972). See also, *United States v. Mosley*, 496 F.2d 1012 (5th Cir. 1974).

It should be noted that this is not a case like *United States v. Soto*, 504 F.2d 557 (5th Cir. 1974), where the informant is unavailable for testimony. This is evidenced by Smith's brief appearance at pre-trial. (Tr. 14) In fact, the informer is a rather notorious character.[3]

It is anomalous that the conviction of one co-defendant should be reversed because the jury was presented erroneous law, while affirming as to the co-defendant who was forced to base his entire defense on the credibility of his alleged cohort, when the prosecution had the individual who could present the most direct and material evidence sitting on the sidelines. Smith's claim of privilege tends to exonerate Gomez-Rojas. Certainly if Sutherlin has suffered a deprivation of due process by not having Smith present to prove entrapment, then Gomez-Rojas has suffered a greater deprivation of fundamental fairness in not having Smith present to prove his absolute innocence.

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3 The Fifth Circuit noted in its first footnote of its opinion of February 10, 1975, that George Smith was also involved in the companion case of United States v. Waddell, 507 F.2d 1226 (5th Cir. 1975), 407 F.2d at 1217 n. 1.

There is no incremental cost in granting Gomez-Rojas a new trial. The benefits of such a finding are the vindication of fundamental fairness and the interests of justice which dictate that Gomez-Rojas be given a fair trial, one in which all the necessary evidence is brought forth. Otherwise the Court will allow the manifest injustice to go unremedied.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted, and Gomez-Rojas given a new trial.

Respectfully submitted,

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Attorney for Petitioner

CERTIFICATE OF SERVICE

I, GUS RALLIS, a member of the Bar of this Honorable Court, do hereby certify that I have this day served upon each opposing counsel copies of the foregoing Petition for a Writ of Certiorari to the United States District Court, Fifth Circuit this ____ day of April, 1975.

GUS RALLIS

APPENDIX

UNITED STATES of America,
Plaintiff-Appellee,

versus

Roberto GOMEZ-ROJAS, and Michael Rece Sutherlin, Defendants-Appellants.

No. 74-1914.

United States Court of Appeals,
Fifth Circuit.

Feb. 10, 1975.

Appeals from the United States District Court for the Western District of Texas.

Before THORNBERRY, GOLDBERG and GODBOLD, Circuit Judges.

GOLDBERG, Circuit Judge:

Appellants Sutherlin and Gomez-Rojas were each convicted by a jury on March 13, 1974, of conspiracy to possess 300 pounds of marihuana with intent to distribute that substance, and of knowingly and intentionally possessing that same marihuana with intent to distribute it, in violation of 21 U.S.C. §§ 846 and 841(a)(1). Although the trial court originally sentenced each appellant to two consecutive five-year

terms in prison, with five years special parole, the sentences were later modified to require Sutherlin and Gomez-Rojas to serve the two five-year terms concurrently, with five more years of special parole. Sutherlin and Gomez-Rojas complain of various errors in their joint trial. After a careful study of the record, we conclude that Sutherlin's conviction must be reversed, but that the jury's verdict must stand as to Gomez-Rojas.

On the morning of November 12, 1973, Special Agent DeHoyos of the Drug Enforcement Administration received a telephone call from a confidential informant, advising DeHoyos that certain individuals at an El Paso, Texas, bar desired to sell a quantity of marihuana for $22,500. At DeHoyos' request, one George Smith arranged a meeting on the afternoon of the 12th at a local motel as a prospective buyer, and Sutherlin, the purported purveyor of contraband. When DeHoyos balked at the price Sutherlin demanded for the marihuana, Sutherlin rejoined that he had no control over the price: "I just set up deals for my man and he takes care of the prices and delivers it." At this point, DeHoyos and Sutherlin adjourned to Smith's automobile, where DeHoyos showed Sutherlin the color of his money; the pair then walked over to Sutherlin's truck, from which Sutherlin removed a kilo of marihuana which he claimed was identical in quality to that which he was offering for sale. Sutherlin and the federal agent then proceeded to a public phone, where Sutherlin made a call to an unknown party, hung up quickly, as "his man could not talk then" and would call back, and shortly thereafter answered a call from an unknown party at the same

phone. Sutherlin then advised DeHoyos that the deal could go through, but that there were certain procedural difficulties to be resolved first. At that point Sutherlin left, after arranging to meet DeHoyos later that evening at a neighborhood restaurant.

When the appointed time came, Sutherlin and DeHoyos shared coffee and idle conversation until they noticed Gomez-Rojas drive into the restaurant parking lot. Sutherlin remarked, "that is my man," went out to talk to Gomez-Rojas for several minutes and returned to tell DeHoyos to have George Smith rent a car for the purpose of transporting the marihuana. When Smith arrived with the rental car, Sutherlin told DeHoyos that his supplier would take the car to a warehouse, load it with the marihuana and deliver the vehicle to a prearranged location. Gomez-Rojas, who had left in the interim, returned to the restaurant parking lot and had another private conversation with Sutherlin. Acting on instructions from Sutherlin, DeHoyos drove the rental car to a parking lot adjacent to the Rudolph Chevrolet dealership; Sutherlin then dropped off DeHoyos and Smith at a motel to await developments.

Soon thereafter, Gomez-Rojas drove into the lot where DeHoyos' rental car was parked, left his automobile and drove the rental car next door to Rudolph Chevrolet, where another, unidentified individual in a Cadillac traded vehicles with Gomez-Rojas and drove the rented car to an undiscovered location, evading a number of federal agents along the way. Sutherlin and DeHoyos met again an hour later and drove in separate vehicles to the parking lot of a

motel, where the rental car was discovered, its trunk loaded with 300 pounds of marihuana. Sutherlin was arrested on the spot and Gomez-Rojas was arrested while in his parked car 100 feet away in the same parking lot.

At trial, Sutherlin took the stand and admitted most of the comings and goings related above; he contended, however, that George Smith was the villain of the piece and that he, Sutherlin, was entrapped. Smith, according to Sutherlin, was a friend who took advantage of Sutherlin's unhappy financial situation to induce an otherwise innocent citizen to aid him in an illicit business transaction with DeHoyos, whom Smith represented as a marihuana dealer from Albuquerque. Sutherlin alleged that Smith is a paid informer and a Government agent, and that Smith was the source of the marihuana which was found in the trunk of the rental car, so that we are faced with the sordid spectacle of the Government selling marihuana to itself. Sutherlin also claimed that Gomez-Rojas was an innocent bystander who happened to appear in the wrong place at the wrong time. Gomez-Rojas, who works as a salesman at Rudolph Chevrolet, agreed with Sutherlin's account and, unlike Sutherlin, denied any knowledge of the marihuana transaction.

I. *Sutherlin*

A.

Sutherlin's sole defense was entrapment, and his intention to demonstrate the truth of this theory at trial was well-known to the district judge before the trial

began. In order to establish his defense, Sutherlin subpoenaed George Smith to testify as his witness on the subject of entrapment. On the day the trial began, however, Smith apprised the trial judge, out of the presence of the jury and before any testimony was heard, of his intention to assert his Fifth Amendment right against self-incrimination if called as a witness.[1] In spite of Sutherlin's protests, the district court excused Smith without the slightest inquiry into the legitimacy or the scope of his proposed refusal to testify. Furthermore, the court forbade Sutherlin to place Smith on the stand for the purpose of eliciting a recitation of his name, his address and the Fifth Amendment to the United States Constitution. Thus, at a stroke, Sutherlin was denied the opportunity to examine the individual who, save himself, could testify most thoroughly about the alleged entrapment. Sutherlin argues that this was error. Sutherlin's complaint involves a complex interplay between the law of entrapment, the informer's privilege and Smith's Fifth Amendment right against self-incrimination. We will discuss each factor of the triad in turn.

The United States Supreme Court first recognized and applied the entrapment defense in Sorrells v. United States, 1932, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413. In *Sorrells*, Chief Justice Hughes ruled for the Court that as a matter of statutory construction, the entrapment defense prohibits Government officials from instigating a criminal act by persons "otherwise innocent in order to lure them to its commission and to punish them," 287 U.S. at 448, 53 S.Ct. at 215, 77 L.Ed. at

1 It is perhaps worthy of note that Smith repeated this performance one week later in the case of United States v. Waddell, 5 Cir. 1975, 507 F.2d 1226, also decided today.

413, reasoning that Congress passes criminal statutes to deter crime rather than to encourage it. In 1958, in Sherman v. United States, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848, and again in 1973, in United States v. Russell, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366,[2] the Court reaffirmed the principle set out in *Sorrells:* that "[e]ntrapment occurs only when the criminal conduct was 'the product of the *creative* activity' of law-enforcement officials." Sherman v. United States, supra, 356 U.S. at 372, 78 S.Ct. at 821, 2 L.Ed.2d at 851. Thus, the entrapment defense turns on the intent or predisposition of the defendant to commit the crime. In 1971, in United States v. Bueno, 5 Cir. 1971, 447 F.2d 903, this Court ruled that the *Sorrells* notion of entrapment must apply as a matter of law where a defendant is charged with dealing in contraband where the contraband in question was supplied to and purchased from the defendant by Government officers or paid informers.[3] If the supplier is a paid informer, the defense is available even if the informer entrapped the defendant on his own initiative, and regardless of whether any Government officer knows the source of the contraband. United States v. Bueno, *supra*. *See* United States v. Mosley, 5 Cir. 1974, 496 F.2d 1012 *and* United States v. Oquendo, 5 Cir. 1974, 490 F.2d 161.

Once the defendant presents a prima facie case of entrapment indicating that Government conduct created "a substantial risk that the offense would be commit-

2 In *Russell*, the Court stressed that the entrapment defense was of a statutory nature and not a constitutional one.

3 In United States v. Oquendo, 5 Cir. 1974, 490 F.2d 161, we determined that there was nothing in United States v. Russell, *supra*, which undermined the validity of the *Bueno* rationale.

ted by a person other than one ready to commit it," Pierce v. United States, 5 Cir. 1969, 414 F.2d 163, 168, the burden shifts to the Government to prove beyond a reasonable doubt that the accused was predisposed to commit the crime charged against him. United States v. Mosley, *supra*. Correspondingly, if the defendant establishes a prima facie case of a transaction of the *Bueno* variety, then the Government must prove beyond a reasonable doubt that the objective facts necessary to a *Bueno* defense did not occur. Once the Government comes forward with evidence that the defendant was not entrapped, then the case may go to the jury. United States v. Oquendo, *supra*.

In an ordinary entrapment case, the Government will seek to demonstrate the defendant's predisposition by pointing to the defendant's conduct and to his reputation for dealing in contraband. *See* United States v. Russell, *supra*. In a *Bueno*-type case, however, the Government's task is more difficult. It may not rely solely on the jury's decision to believe or not to believe the defendant's story. United States v. Bueno, *supra*, 447 F.2d at 906. Since in many cases of this type, of which *Bueno* itself was one, the only witnesses to the alleged entrapment are the defendant and the Government agent or informer, the Government must call the alleged supplier, its officer or its informer, as a witness. If the purported supplier is unavailable, however, as in our recent case of United States v. Soto, 5 Cir. 1974, 504 F.2d 557, where the informer had died in the interim, the Government may defeat the defense of entrapment by otherwise demonstrating that the contraband came from a non-Government-related source.

From this discussion of the law of entrapment, it is readily apparent that many such cases involve informers. This circumstance creates additional legal difficulties, for such individuals are not readily available as witnesses. The Supreme Court set out the law of informer's privilege in Roviaro v. United States, 1957, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639:

> What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. . . . The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.

The scope of the privilege is limited by its underlying purpose. Thus, where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged. Likewise, once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable.

A further limitation on the applicability of the privilege arises from the fundamental re-

quirements of fairness. Where the disclosure of an informer's identity . . . is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action. . . .

We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors. 353 U.S. at 59-62, 77 S.Ct. at 627, 1 L.Ed.2d at 644-646.

Where a defendant charges that a paid Government informer has entrapped him, *Roviaro* ordinarily demands disclosure of the informer's identity, since the defendant's entire defense rests upon allegations which the informer is in a unique position to affirm or deny. *See* United States v. Bueno, *supra* and United States v. Oquendo, *supra; see* also Branzburg v. Hayes, 1972, 408 U.S. 665, 698, 92 S.Ct. 2646, 33 L.Ed.2d 626, 649. This requirement involves a legal fiction, in that a defendant who claims entrapment cannot help but admit that he knows the identity of the informer.

The exclusionary scope of the informer's privilege, however, is so broad as to cripple the defendant's defense unless the defendant goes through the motions of requiring disclosure, so that he may call the informer as a witness, compel the Government to call him or ask other witnesses questions about the informer. In this case, Sutherlin knows very well who the alleged informer Smith is, and he knew before the trial where Smith could be reached by process, for Smith was served with a subpoena to appear as Sutherlin's witness. It was then that Smith, apparently on his own motion, informed the trial judge that he would refuse to testify if called, and the district court accepted his claim of Fifth Amendment privilege without more and excused him from testifying.

The Fifth Amendment to the United States Constitution declares in part that "No person . . . shall be compelled in any criminal case to be a witness against himself." In Hoffman v. United States, 1951, 341 U.S. 479, 486-487, 71 S.Ct. 814, 818, 95 L.Ed. 1118, 1124, the Supreme Court enunciated the standard for measuring when a witness may properly claim his right against self-incrimination, and thus refuse to respond to questioning:

> To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it was asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. . . .

The *Hoffman* Court also indicated, however, that a simple blanket declaration by the witness that he cannot testify for fear of self-incrimination will not suffice to invoke the privilege, *see* United States v. Malnik, 5 Cir. 1974, 489 F.2d 682; the mechanism of the Fifth Amendment is not automatic or self-winding. Accordingly, the custom is for the trial judge to examine the protesting witness out of the presence of the jury in order to determine the validity of his claim. Once the court satisfies itself that the claim is well-grounded as to the testimony desired, it may, in its discretion, decline to permit either party to place the witness on the stand for the purpose of eliciting a claim of privilege or to comment on this circumstance. United States v. Lacouture, 5 Cir. 1974, 495 F.2d 1237, cert. denied ___ U.S. ___, 95 S.Ct. 631, 42 L.Ed.2d ___.

In this case, the Government cannot be penalized, either under the Compulsory Process Clause of the Sixth Amendment or the law of entrapment, because Smith chose to exercise his Fifth Amendment rights, thus making himself as unavailable for purposes of testimony as the deceased informant in United States v. Soto, *supra*. *See* United States v. Tatum, 5 Cir. 1974, 496 F.2d 1282. That is not to say, however, that Smith's claim of privilege was well-founded.

In United States v. Lacouture, *supra*, the district court held an extensive hearing out of the presence of the jury in order to establish the fact that the witness could legitimately refuse to answer essentially all relevant questions that could be put to her. Here, on the other hand, we have only Smith's bald assurance

that he has a proper Fifth Amendment right to refuse to answer any relevant question that Sutherlin could ask of him. In such a situation, especially considering the critical nature of his testimony, we conclude that the district court erred in excusing him as a witness. On remand, the trial court must hold a hearing to determine whether Smith's fear of self-incrimination is well-founded and what the parameters of his Fifth Amendment rights are in the context of the testimony that Sutherlin wishes to obtain from him. If the court finds that Smith cannot properly invoke the Fifth Amendment with respect to any relevant and material questions which Sutherlin purposes to ask him, then Smith must testify at the new trial. If, on the other hand, the court finds that Smith may legitimately refuse to answer essentially all possible relevant questions, then the district court must decide in its informed discretion whether, in light of Sutherlin's entrapment defense, Sutherlin should be allowed to elicit Smith's refusal to testify before the jury or to comment on that refusal.

B.

Sutherlin also objected at trial and argues now that the trial court improperly instructed the jury when it charged that an entrapment defense was made out only if the Government furnished the marihuana to Sutherlin, either directly or through Smith:

> In order for there to be entrapment . . . you would have to find that the Government had delivered or turned over or made available the marihuana that was going to be delivered, that

> Mr. Sutherlin was going to sell to the agent. . . . Now if you find from the evidence that the Government entrapped Mr. Sutherlin, that they furnished the means, the marihuana, turned it over to the man Smith, or whoever it is to use to entrap Mr. Sutherlin, then [you would have to decide whether the Government proved beyond a reasonable doubt that Sutherlin was not entrapped].

Our previous discussion of the law of entrapment demonstrates that this instruction was indeed erroneous, because entrapment would arise here if Smith had supplied the marihuana to Sutherlin from his own resources and without the actual knowledge of DeHoyos or any other Government officer. The law does not require that a man be badged in order to be capable of entrapping an innocent citizen. Given the critical relationship of the instruction to Sutherlin's sole defense, and finding no other part of the instructions which remedies that defect, we conclude that Sutherlin must have a new trial. In view of our disposition of Sutherlin's appeal, we pretermit discussion of his other claims of error.

II. *Gomez-Rojas*

Gomez-Rojas does not claim that he was entrapped, but rather argues that he is innocent of any wrongdoing, and that the evidence introduced against him fell far short of that necessary to support the jury's verdict against him. In reviewing the sufficiency of the evidence supporting a criminal conviction, we must sustain the jury verdict if, taking the view most

favorable to the Government, there is substantial evidence to support it. Glasser v. United States, 1942, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680; United States v. Velasquez, 5 Cir. 1974, 496 F.2d 1009. Although the test for sufficiency is the same whether the evidence is direct or circumstantial, United States v. Moore, 5 Cir. 1974, 505 F.2d 620; United States v. Velasquez, *supra*; United States v. Warner, 5 Cir. 1971, 441 F.2d 821, cert. denied, 404 U.S. 829, 92 S.Ct. 65, 30 L.Ed.2d 58, we must determine not only that the inferences to be drawn from the circumstantial evidence against Gomez-Rojas are consistent with guilt but that a jury could conclude that those inferences are inconsistent with every reasonable hypothesis of innocence. United States v. Fairchild, 5 Cir. 1975, 505 F.2d 1378; United States v. Ferg, 5 Cir. 1974, 504 F.2d 914; *see* United States v. Squella-Avendano, 5 Cir. 1973, 478 F.2d 433.

The jury here heard evidence that Sutherlin told DeHoyos at their first meeting that he, Sutherlin, was only a middleman in this transaction, that "my man . . . takes care of the prices and delivers [the marihuana]." DeHoyos testified that while he and Sutherlin were seated in the restaurant, Gomez-Rojas drove into the restaurant parking lot, at which time Sutherlin stated "that is my man" and went out to talk to Gomez-Rojas. After this conversation, Sutherlin instructed DeHoyos to rent a car for the purpose of transporting the marihuana which was the object of their negotiations. There was also testimony that immediately after Smith brought the newly-rented automobile into the restaurant parking lot, Gomez-Rojas returned and had another private conversation with Sutherlin. Federal agents testified that after

DeHoyos had driven the rental car to a parking lot next to Rudolph Chevrolet, Gomez-Rojas drove into the same lot, parked his car next to the rental car and entered that car. Almost immediately thereafter, a person dressed similarly to Gomez-Rojas was observed leaving the rental car in the Rudolph Chevrolet lot and exchanging vehicles there with an unidentified individual who drove the rental car to an undiscovered location.[4] Finally, at the time Sutherlin was arrested in the motel parking lot while in the process of exchanging the marihuana for DeHoyos' cash, Gomez-Rojas was apprehended while sitting in his own automobile 100 feet away in the same parking lot.

Gomez-Rojas and Sutherlin agree on the former individual's true role in the piece and each defendant took the stand to give a reasonably coherent explanation of Gomez-Rojas' unfortunate ubiquity on the night of November 12, 1973. Very generally, defendants contend that they had been friends for some time on the night in question, so that when Sutherlin saw Gomez-Rojas enter the restaurant parking lot, he rushed out to warn the latter away, lest Gomez-Rojas make some amiable remark upon finding Sutherlin in the restaurant and thereby reveal to DeHoyos the identity that Sutherlin claims he had not yet divulged. Gomez-Rojas contends that his activities in the Rudolph Chevrolet lot are easily explained by the fact that he is a salesman at that establishment and frequently has to move several cars about on the lot prior

4 There was some confusion among the several agents who testified about the events in and near the Rudolph Chevrolet lot as to whether the car that Gomez-Rojas drove into the lot was a light brown or beige Ford or a gold Chevrolet (it was the former). We do not believe that such confusion, especially at night is significant.

to closing for the night; he necessarily adds that the federal agents are mistaken in their contention that one of the autos he moved that night was the rental vehicle used in the marihuana transaction. Finally, Sutherlin and Gomez-Rojas agree that the former had asked the latter for a ride home from the motel that night, not because Sutherlin actually needed such a ride (he had his own vehicle on hand), but because Sutherlin wanted a friend around when dealing with DeHoyos late at night in a deserted motel parking lot.

Sutherlin and Gomez-Rojas presented the jury with a plausible explanation of Gomez-Rojas' behavior, an explanation which differs in only a few particulars from what Government witnesses testified that they saw on that night. Be that as it may, the jury rejected the defendants' story and convicted Gomez-Rojas of the offenses charged against him. Although this is a close case, we cannot say that there is insufficient evidence to support the verdict. A comparison of this case with our decision in United States v. Arroyave, 5 Cir. 1973, 477 F.2d 157, will demonstrate why this verdict must stand.

The defendant in *Arroyave* was charged with conspiracy to import and possess marihuana and with possession of marihuana with intent to distribute. The evidence there showed that Arroyave was a friend of a co-defendant, Posada, that Posada's truck was seen near Arroyave's home on several occasions and that on the day when a plane carrying the marihuana upon which the charges were based landed in the United States and the marihuana delivered to Posada, Arroyave was observed near the aircraft and spoke to

Posada at that time. We found that the evidence against Arroyave amounted at most to guilt by association and that the Government's circumstantial evidence was insufficient to exclude the possibility that Arroyave knew nothing about the contraband transaction.

Much of the evidence against Gomez-Rojas tends only to establish his guilt by association with Sutherlin, who had admitted his part in the transaction. The evidence which differentiates this case from *Arroyave* is the testimony by several surveilling federal agents which tends to show that Gomez-Rojas moved the rental automobile from the place where DeHoyos had left it to the Rudolph Chevrolet lot, where another individual drove it into the night, to be loaded with marihuana by unknown hands at an unknown place. Considered in conjunction with the other circumstantial evidence against Gomez-Rojas, this action was sufficient to support an inference by the jury that Gomez-Rojas was a knowledgeable and active member of the conspiracy, and not just an innocent bystander. *See* United States v. Prieto, 5 Cir. 1974, 505 F.2d 8 *and* United States v. Sidan-Azzam, 5 Cir. 1972, 457 F.2d 1309. Once the jury made such a finding, it could consider Sutherlin's alleged statements that "his man" was supplier and that Gomez-Rojas was "his man." *See* United States v. Tyler, 5 Cir. 1975, 505 F.2d 1329. The jury could have found that this combination of Gomez-Rojas' actions and Sutherlin's statements was inconsistent with every reasonable hypothesis of Gomez-Rojas' innocence. There was thus sufficient evidence to sustain Gomez-Rojas' conviction on the conspiracy charge.

Since constructive as well as actual possession of contraband will sustain a conviction under 21 U.S.C. § 841(a), United States v. Ferg, 5 Cir. 1974, 504 F.2d 914, and since the dominion and control over the contraband necessary to constitute such possession can be proven by circumstantial evidence, United States v. Richardson, 5 Cir. 1974, 504 F.2d 357, we believe that the evidence here was sufficient to support the jury's verdict that Gomez-Rojas indeed possessed the marihuana with intent to distribute it.

Gomez-Rojas also contends that the trial court erred in failing to declare a mistrial on two occasions when questions by defense counsel to two federal agents elicited responses indicating that Gomez-Rojas had previously been involved in drug transactions. There is no merit in this argument. Each answer was in fair response to counsel's inquiry about why it was that the surveilling agents recognized Gomez-Rojas. There is no allegation or evidence of Government impropriety in the matter. *See* United States v. McKinley, 5 Cir. 1974, 493 F.2d 547.

Gomez-Rojas claims that the district court should not have admitted De-Hoyos' testimony that Sutherlin stated "[t]hat is my man" when Gomez-Rojas drove into the restaurant parking lot for the first time. The Government rejoins that this statement was admissible against Gomez-Rojas, as it falls within the co-conspirator exception to the hearsay rule. This exception admits hearsay statements made by one conspirator about another, if the statement was made in the course of and in furtherance of the conspiracy. Krulewitch v. United States, 1949, 336 U.S. 440, 69 S.Ct. 716, 93 S.Ct. 716, 93 L.Ed. 790; United States v. Reg-

ister, 5 Cir. 1974, 496 F.2d 1072. In order to set the predicate for the admission of such testimony, however, the Government must first establish, through independent evidence, a prima facie case of conspiracy with respect to the defendant against whom it is to be admitted. Until that time, the evidence is admissible only against the declarant; once the jury finds that such a foundation has been laid, however, it may consider the hearsay testimony for whatever else it may show. United States v. Tyler, *supra;* United States v. Apollo, 5 Cir. 1973, 476 F.2d 156; *see* Lutwak v. United States, 1953, 344 U.S. 604, 73 S.Ct. 481, 97 L.Ed. 593.

The trial court here gave a full and accurate cautionary charge to the jury at the time Sutherlin's statement was offered and the court repeated the charge at the conclusion of the trial. The value of such a charge in these circumstances is highly questionable, especially where, as here, the evidence against the defendant against whom it is offered is completely circumstantial. Furthermore, it is difficult to see what possible value the statement could have if it is not admissible for the purpose of inculpating Gomez-Rojas in the conspiracy. However that may be, the case law clearly compels the conclusion that the statement was properly admitted.

Gomez-Rojas next argues that the trial court's instructions to the jury constituted a directed verdict of guilty. In reviewing a trial judge's instructions, we must evaluate the charge as a whole, without isolating statements which may appear prejudicial outside the context in which they were made. United States v.

Cisneros, 5 Cir. 1974, 491 F.2d 1068; United States v. Williams, 5 Cir. 1973, 473 F.2d 507; United States v. Jacquillon, 5 Cir. 1972, 469 F.2d 380. Judged by this standard, although the district court at times appears to have been less than even-handed in its recitation of the evidence, its charge, taken as a whole, was complete and accurate, with the exception already noted with respect to entrapment, about which Gomez-Rojas may not complain.

Finally, Gomez-Rojas charges that the trial was so interspersed with judicial interference with the presentation of his case, and so replete with comments from the bench unfavorable to him that he was denied a fair trial. In considering this very serious charge, we must look to the record as a whole, United States v. Hill, 5 Cir. 1974, 496 F.2d 201; United States v. Ramsey, 5 Cir. 1974, 493 F.2d 457, noting that the district judge, as governor of the trial process, may take measures to ensure that the trial progresses smoothly, and may comment on the evidence, so long as he is careful to instruct the jury that they are the sole judges of the facts. United States v. Cisneros, *supra*; United States v. Jacquillon, *supra*. We will affirm a conviction on the basis of a record disclosing significant judicial participation, however, only when we are convinced that the intervention could not reasonably have led the jury to a predisposition of guilt by improperly confusing the functions of judge and prosecutor. United States v. Hill, *supra*; *see generally* Quercia v. United States, 1933, 289 U.S. 466, 53 S.Ct. 698, 77 L.Ed. 1321. Although the trial judge here sometimes seemed less than convinced by some of defendant's evidence, and at other times displayed considerable

impatience with Gomez-Rojas' presentation of his case, we do not find the sort of judicial advocacy of the Government's position which would have denied Gomez-Rojas a fair trial.

In summary, Sutherlin's conviction is reversed; he is entitled to a new trial because of an erroneous jury instruction. If, at a second trial of Sutherlin, Smith again declines to testify, the district court must be careful to ascertain whether and to what extent his claim of right is well-founded, and what effect this finding should have on Sutherlin's presentation of his entrapment defense to the jury. Gomez-Rojas, on the other hand, had a trial free from reversible error. Although the circumstantial evidence against him is far from over-whelming, it is sufficient to sustain the jury verdict; Gomez-Rojas' conviction is affirmed.

Affirmed in part; reversed in part and remanded.

JUDGMENT AND COMMITMENT

Filed: June 13, 1974

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

UNITED STATES OF AMERICA

versus No. EP-74-CR-71

ROBERTO GOMEZ-ROJAS

On this 15th day of February, 1974 came the attorney for the government and the defendant appeared in person and by Gus Rallis, counsel

IT IS ADJUDGED that the defendant upon his plea of not guilty, and a jury verdict of guilty on March 13, 1974 has been convicted of the offense conspiring to commit offenses against the United States, in violation of 21 USC § 846, that is to say, he conspired to possess Marihuana, a Schedule I Controlled Substance, with intent to distribute same contrary to 21 USC § 841(a)(1); and possess with intent to distribute a quantity of marihuana, a Schedule I Controlled Substance, in violation of 21 USC § 841(a)(1) as charged in the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted. Sentence was deferred until April 9, 1974.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE YEARS, ct 1; FIVE YEARS on count 2, to run consecutively to count 1; and FIVE YEARS special parole.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment on the 9th day of April 1974.

/s/ Ernest Guinn
United States District Judge.

The Court recommends commitment to

Approved:

/s/ RONALD F. EDERER
Assistant U.S. Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS,
EL PASO DIVISION

UNITED STATES OF AMERICA,

versus No. EP-74-CR-71

ROBERTO GOMEZ-ROJAS

ORDER MODIFYING THE SENTENCE

It appearing to the Court that Defendant has a family residing in El Paso, and that the ends of justice and the best interest of the public, as well as the Defendant, will be subserved thereby by committing the Defendant to the Federal Correctional Institution in El Paso County so that he may be near his family, it is ORDERED by the Court that the Judgment and Commitment entered herein on the 9th day of April, 1974 be modified so that,

IT IS NOW THE JUDGMENT AND SENTENCE OF THE COURT that the Defendant be, and hereby is committed to the custody of the Attorney General or his authorized representative for a period of five years on Count 1, and Five years on Count 2 to run concurrently with Count 1 and Five years special parole.

The Marshal is requested to commit the Defendant to La Tuna Correctional Institution so that his family may be near him.

IT IS ORDERED that the Clerk deliver a certified copy of this Judgment and Commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the Defendant, and that copy be furnished to the Defendant of his modified judgment.

ENTERED THIS 24 day of May, 1974.

/s/ ERNEST GUINN
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-1914

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ROBERTO GOMEZ-ROJAS
and MICHAEL RECE SUTHERLIN,
Defendants-Appellants.

Appeals from the United States District Court for the Western District of Texas

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ON PETITION FOR REHEARING

(March 26, 1975)

Before THORNBERRY, GOLDBERG and GODBOLD, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

Supreme Court, U. S.
FILED
JUL 8 1975
MICHAEL RODAK, JR., CLERK

No. 74-1343

In the Supreme Court of the United States

OCTOBER TERM, 1975

ROBERTO GOMEZ-ROJAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1343

ROBERTO GOMEZ-ROJAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the Western District of Texas, petitioner and another were convicted of possessing 300 pounds of marijuana with intent to distribute, and of conspiring to commit that offense, in violation of 21 U.S.C. 846 and 841(a)(1).[1] Petitioner was sentenced to concurrent terms of five years' imprisonment, to be followed by five years' special parole. The court of appeals affirmed (Pet. App., pp. 1a-21a; 507 F.2d 1213). Petitioner contends that he is entitled to a retrial at which the prosecution must make available as a witness an alleged informant and participant in petitioner's crime.

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[1]Michael Rece Sutherlin was tried and convicted with petitioner. Sutherlin, but not petitioner, had claimed to have been entrapped. The court of appeals reversed Sutherlin's conviction on the ground that incorrect entrapment instructions had been given to the jury (Pet. App., pp. 12a-13a, 21a).

The facts are fully set forth in the opinion of the court of appeals. Petitioner's co-defendant Michael Sutherlin arranged to sell a quantity of marijuana for $22,500 to Special Agent Phillip DeHoyos of the Drug Enforcement Administration. George Smith introduced Sutherlin to DeHoyos and arranged a meeting between them. When DeHoyos complained about Sutherlin's price, Sutherlin stated that price was beyond his control: "I just set up deals for my man and he takes care of the prices and delivers it" (Pet. App., p. 2a). Sutherlin then showed DeHoyos a sample of the marijuana and DeHoyos displayed his cash. Following a telephone conversation between Sutherlin and an unknown person, Sutherlin told DeHoyos that the sale could be completed. Sutherlin departed after arranging to meet DeHoyos later at a neighborhood restaurant.

Sutherlin and DeHoyos met as arranged and engaged in conversation until petitioner drove into the parking lot of the restaurant. Sutherlin told DeHoyos, "that is my man" (Pet. App., p. 3a). Sutherlin spoke alone with petitioner for several minutes and then returned to tell DeHoyos to have Smith rent a car in which to transport the marijuana. Smith arrived with a rental car, and Sutherlin told DeHoyos that his supplier would take the car, load it with marijuana, and deliver it to a prearranged location. Petitioner, who had left while Sutherlin and DeHoyos spoke, returned to the parking lot and had another private conversation with Sutherlin.

Pursuant to Sutherlin's instructions, DeHoyos left the rental car in a lot adjacent to a car dealership at which petitioner was employed. Petitioner drove the rental car into the auto dealership lot, where an unidentified individual in a Cadillac traded vehicles with petitioner; that individual drove the rented car to an undiscovered location (evading several federal agents).

Sutherlin and DeHoyos met again at a motel where the rental vehicle was returned, its trunk loaded with 300 pounds of marijuana. Petitioner was arrested while sitting in his car parked 100 feet from the motel.

At trial, Sutherlin testified on his own behalf; he claimed that he had been entrapped by Smith, whom he alleged to be the source of the contraband, and that petitioner was an innocent bystander. Petitioner denied any knowledge of the marijuana transaction.

1. Petitioner apparently contends that he was denied due process of law by being unable to "confront" Smith.[2] He asserts that, since the evidence against him was circumstantial, it was the government's duty to provide Smith's testimony in order to cast additional light on the facts of the case.[3] But the government was not obliged to offer the testimony of every available witness to petitioner's offense. It needed to provide only enough evidence to show, beyond a reasonable doubt, that petitioner is guilty. The court of appeals examined the evidence against petitioner and correctly concluded that it is sufficient to sustain the conviction (Pet. App., pp. 13a-14a). See *Glasser* v. *United States*, 315 U.S. 60, 80. Petitioner's activities on the day in question—including removing and returning the rented car—were more than sufficient to implicate him in the crime. It was not necessary for the government to call Smith.

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[2]Smith did not testify and was not a witness against petitioner. The Sixth Amendment right to confrontation therefore is not implicated in this case, although petitioner uses the term "confront" in several places. At all events, petitioner, having failed to raise a "confrontation" issue on appeal, may not raise that issue now. *Lawn* v. *United States*, 355 U.S. 339, 362; *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147, n. 2.

[3]Contrary to petitioner's contention (Pet. 14, 16), this case does not involve the problem of the "informer's privilege". That "privilege" allows the government to withhold from defendants the name of an informant. See *Roviaro* v. *United States*, 353 U.S. 53. But Smith, the informer here, was in court and known to petitioner. Indeed, Smith was subpoenaed by both petitioner and his co-defendant. When called on *voir dire* Smith indicated that he would not testify, and he did not take the stand (Tr. 14-18). Petitioner does not allege that Smith's testimony would have been directly exculpatory, only that the evidence against him was insufficient.

2. Petitioner also claims that the failure of the district court to compel Smith to testify prejudiced his ability to present an entrapment defense. Because this contention was not raised below, it should not be considered here. *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16; *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147, n. 2. It is, in any event, unavailing.

Petitioner seems to claim that he is entitled to acquittal under *United States* v. *Bueno*, 447 F.2d 903, 906 (C.A. 5), affirmed on remand, 470 F.2d 154 (C.A. 5), certiorari denied, 411 U.S. 949, if the government supplied the contraband. But petitioner did not present an entrapment defense at trial. He claimed instead that he had no connection with the sale. The *Bueno* defense would be available only to a defendant who had participated in the transaction. Entrapment is not available as a defense to one who claims that he did not participate in the crime. *Canal Zone* v. *Risbrook*, 454 F.2d 725 (C.A. 5); *United States* v. *Barrios*, 457 F.2d 680, 682 (C.A. 9); *United States* v. *Carter*, 326 F.2d 351, 353 (C.A. 7); *United States* v. *Shameia*, 464 F.2d 629 (C.A. 6). But cf. *Hansford* v. *United States*, 303 F.2d 219 (C.A.D.C.) (*en banc*).

Finally, petitioner contends (Pet. 14-15) that Smith's testimony would have had a bearing upon Sutherlin's credibility. Apparently petitioner argues that if Smith's account of the sale corroborated Sutherlin's, that would not only have established Sutherlin's entrapment defense but also, by enhancing Sutherlin's credibility, have added greater weight to Sutherlin's exculpatory testimony concerning petitioner. That argument is, of course, based upon sheer speculation. But if in fact Smith's account corroborated Sutherlin's, it would do so by incriminating Smith

himself. Smith would of course have been privileged to refuse to provide such testimony. There was therefore no reason for him to have been called as a government witness.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1975.